1978

Nancy Jane Peart Roche v. Melvin Kent Roche : Brief of Plaintiff-Respondent

Utah Supreme Court

IN THE SUPREME COURT FOR THE

STATE OF UTAH

NANCY JANE PEART ROCHE, Plaintiff and Respondent,	)	
vs.	)	Case No. 15806
MELVIN KENT ROCHE, Defendant and Appellant.	)	

BRIEF OF PLAINTIFF - RESPONDENT, NANCY JANE PEART ROCHE

Appeal from the Judgment of the First Judicial District Court for Box Elder County, State of Utah, the Honorable VeNoy Christoffersen, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an appeal from a denial of a Motion to Amend the Decree of Divorce which motion was made two years after the Decree was granted.

DISPOSITION IN LOWER COURT

Defendant-Appellant's Motion to Amend the Decree of Divorce was denied with prejudice in the First Judicial District Court of Box Elder County by the Honorable VeNoy Christoffersen, Judge. The Motion to Amend sought to relieve Defendant-Appellant of child support payments ordered by the Decree granted April 9, 1975; the Motion to Amend was dated September 24, 1977. The Court ruled that the proper procedure

to consider new evidence at such late date after the Decree had been granted was to bring a new action rather than to file a Motion to Vacate the Decree as to paternity.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant states in his brief to this court the relief he seeks on appeal. He asks for a reversal of the lower court's denial of his motion to amend the Decree of Divorce, which motion he based on Utah Rules of Civil Procedure, Rule 60(b), and an application for a Writ of Coram Nobis. The proper relief to seek from this court is a ruling that the lower court abused its discretion or acted contrary to law in requiring Appellant-Defendant to bring his request for partial relief by reasons of an independent action rather than by means of a Motion in the original action. Such relief sought on appeal would be directly responsive to the trial court's ruling.

STATEMENT OF FACTS

Plaintiff-Respondent, hereinafter referred to as the Respondent, adopts the facts substantially in the form as set out in Defendant-Appellant's brief, hereinafter referred to as Appellant, in as far as the facts are revealed, but Appellant fails to outline the facts concerning procedural actions which were taken and thus confuses the issue which is now before this court. The additional necessary facts follow.

The Decree of Divorce was granted April 9, 1975 (R-33)

between Appellant and Respondent with provisions for child support and rights of visitation. On April 4, 1977, Appellant made a motion in the lower court to vacate the Decree of Divorce as to paternity and to obtain relief from child support payments upon the discovery of new evidence which showed that he was not the biological father of the child (R-66). Appellant attached an application for a Writ of Coram Nobis to this motion, though he did not file, pay filing fees, nor meet the statutory requirements for issuance and service of process involved with an independent action.

The court, in a Memorandum Decision dated February 17, 1978, ruled against Appellant's Motion upon the finding that the case was directly controlled by McGavin v. McGavin, 27 Utah 2d 200, 494 P.2d 283 (1972) and Shaw v. Pilcher, 9 Utah 2d 222, 341 P.2d 949 (1959), (R-99). Appellant argued in his Motion for Reconsideration dated January 30, 1978, that upon the theory of the Writ of Coram Nobis and Utah Rules of Civil Procedure, Rule 60(b), the court should have granted his motion and that the recent case of Egan v. Egan, 560 P.2d 704 (1977), mandates the granting of his motion (R-102). The trial court, in a Memorandum Decision dated March 16, 1978, ruled against such Motion to Reconsider (R-114).

The additional facts are necessary to clarify that the reason "the Court denied the setting aside of the order of payment of child support" (last paragraph of Appellant's brief, p. 5) is that the court found upon the rulings of Shaw, McGavin and Egan, supra, that the proper method of obtaining partial

relief from the Divorce Decree is to bring an independent action; a Motion to Amend the original Divorce Decree is inadequate. The record discloses that from beginning to end all documents filed are filed in Civil No. 12730.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT THE MOTION TO AMEND THE DIVORCE DECREE AND THE COURT PROPERLY RULED THAT A NEW, INDEPENDENT ACTION WAS THE PROPER AVENUE FOR OBTAINING RELIEF.

A. Appellant's Motion did not meet the requirements of Utah Rules of Civil Procedure, Rule 60(b) because the Motion for Amendment came more than three months after Judgment had been entered.

Rule 60(b) endows the trial court with considerable authority to ensure justice by allowing the trial court to grant a motion to obtain relief from a Judgment if the motion is based upon certain theories and if the motion is timely. The facts of the case here may fall within one or more of three possible theories which could be the basis for Appellant's motion for relief: Mistake, newly discovered evidence, or fraud. Other theories upon which a motion for relief can be grounded are listed and in his pleadings, appellant does assert that his case falls within the catch-all of reason (7), "any other reason justifying relief". Despite that assertion, he clearly argues and attempts to prove his cause on the basis of either mistake, newly discovered evidence, or fraud,

but those three theories all require that a Motion for relief must be brought within three months of the entry of Judgment; Appellant's Motion to Amend the Divorce Decree was brought two years after the Decree of Divorce had been entered.

(Appellant's cause does not qualify for a Rule 60(b) motion for relief, by a reading of the language of the Rule.)

The Rule clarifies that it does not limit the power of a court to entertain an independent action to relieve a party from a Judgment. Appellant's Argument, Point I, confuses the issues and argues that the trial court erred in not making a finding of fact that the child was not his. The court does specifically recognize that fact, but, in following the mandate of Rule 60(b), it holds that relief from the Decree of Divorce should come by way of a separate action and not as a Rule 60(b), (1), (2), or (3) motion.

B. The Trial court did not misconstrue case law as it has developed in Shaw v. Pilcher, McGavin v. McGavin and Egan v. Egan, which cases required the trial court to hold as it did.

Appellant relies heavily upon Egan v. Egan, supra. He argues that it controls this matter and displaces Shaw v. Pilcher, supra, and McGavin v. McGavin, supra, as controlling authority. In Shaw v. Pilcher, an ex-husband consented to the adoption of the child of his marriage by his ex-wife and her new husband. When the ex-husband found that the character of the new husband was questionable, he moved the court to grant relief in the original adoption matter by setting aside the adoption decree, alleging that the new husband and ex-wife had defrauded the

court. This was seventeen months after the adoption decree was entered. The new husband argued that the proceeding for relief was in violation of Rule 60(b) because it fell outside the three month limitation period. This court then ruled at 950:

> A reading of the rule makes it apparent that a motion for relief based on the grounds enumerated therein is ineffective if made three months after the decision from which relief is sought. The proceeding here, although captioned a "Petition", was in fact a motion made in the original action, and was based primarily on an allegation of "fraud upon the court". We believe and hold that where "fraud upon the court" is the gravamen of the proceeding, such proceeding must be pursued in an independent action by filing a separate suit, paying the statutory filing fee therefore, (which was not done here) and requiring the statutory issuance and service of process.
>
> The attack here being based upon fraud upon the court, and having been leveled some seventeen months after the adoption decree, must have been pursued in an independent action, and not by way of motion in the original action. Otherwise, the rule would not make sense.

The Shaw v. Pilcher reasoning was found to directly control in McGavin v. McGavin, a 1972 case. There, upon facts substantially similar to those of the instant case, the court ruled at 283 that the motion to set aside the divorce decree relating to custody of and support money for a child which was allegedly not the issue of the marriage, was improper because the motion was made 14 1/2 months after the divorce decree.

> Such procedure did not comply with Rule 60(b), Utah Rules of Civil Procedure, Vo. 9, p. 662, Utah Code Annotated, 1953. The instant case is governed by the provisions of that rule as interpreted in the case of Shaw v. Pilcher, 9 Utah 2d 222, 341 P. 2d 949 (1959) which is dispositive here.

Appellant's reliance upon Egan v. Egan is misplaced because Egan did not overrule or weaken Shaw or McGavin. In reality, Egan strengthens the Shaw and McGavin line of reasoning. Egan holds on facts strikingly similar to the instant case that under Rule 60(b), the trial court may exercise its discretion to grant the relief necessary to do justice even though the action comes later than three months after the Decree is entered, if relief is sought by way of an independent action. The Supreme Court, in reaching this decision through the same trial judge who ruled in the instant case, strengthens the discretion of the trial court to grant that relief which is necessary to do Justice. Egan does not overrule Shaw and McGavin, but rather fills out case law interpretation of the meaning of Rule 60(b). Shaw & McGavin hold that relief under Rule 60(b) may come from a motion made as part of the same proceedings if brought within three months of the entering of the Judgment. Egan illuminates another aspect of the rule: Nothing in Rule 60(b) limits the rights of parties to obtain relief in an independent action brought outside the three-month limitation period.

The case law required the trial court to disallow a motion brought as part of the same proceeding and not as a separate action when the motion came two years after the entry of Judgment.

C. Appellant's Request for a Writ of Coram Nobis was correctly refused, it being in fact a motion in the original action and not an independent action.

Although there is some authority that a common-law Writ

of Coram Nobis may be considered to be in the nature of a new action, 18 Am.Jur2d, §31, Coram Nobis, the conduct of the Appellant in his pleadings and argument before the court rightly demonstrated to the trial court that the gravamen of the action was a motion made upon the mistake theory of Rule 60(b)(1), the newly discovered evidence theory of Rule 60(b)(2), or upon the fraud or misrepresentation theory of Rule 60(b)(3), and not upon the Rule 60(b)(7) catch-all provision.

This conclusion is reasonable in light of the facts. Appellant's request for a Writ of Coram Nobis first appeared on April 4, 1977 as an attachment to a motion in the original action which motion was to partially vacate the Decree of Divorce; and even though Appellant attempted to style his motion as an application for a Writ of Coram Nobis, it was in truth, a Rule 60(b) motion clothed in another label. This is apparent from Appellant's attempts to show by medical opinions and results of tests that newly discovered evidence did not justify the Judgment; this approach goes directly to the mistake and/or newly discovered evidence theories of the Rule. In addition, in his affidavit attached to the Motion to partially vacate the Decree of Divorce, Appellant states in paragraph 9 that he believes that the ex-wife's representations in the original Decree were false; this is argument which would support the fraud theory of the Rule.

The Court's ruling that the application for the Writ

was simply another motion, serves to preserve the integrity of the court system and the procedures by which it is governed. As in Shaw, Appellant here should be prevented from applying a label to his action in order to meet the requirements of the law (assuming arguendo that the Writ of Coram Nobis is a new action in this jurisdiction and exempt from the usual requirements of filing, fees, notice and service of process) while truly and as a matter of fact he argues a different theory for which he does not qualify. The requirement that Appellant style, plead and prove the same theory and the requirement that he must qualify under that theory are not mere technicalities; the requirements should be imposed to protect the integrity of the judicial system and provide regularity and stability upon which all may depend. This strong policy of the law is stated in Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662, (1966). Though the facts of that case are not similar to the instant dispute, it was decided upon the same policy as should control in all contests of procedure.

> Even though the new rules of procedure had as a part of their purposes the removing of undue technicalities and rigidities in the law, and are to be liberally construed to effectuate justice, nevertheless, they were designed to provide a pattern of regularity of procedure which the parties and the courts could follow and rely upon. (Drury v. Lunceford, supra, at 663.)

The trial court has ruled that Appellant may not obtain relief through an improper method and that he must make that attempt for relief by properly filing a new, independent action.

Such a requirement is uniformly imposed upon all who wish to avail themselves of the protection of the courts.

CONCLUSION

Rule 60(b) requires that a party seeking to obtain relief from a Judgment upon the grounds of mistake, newly discovered evidence, or fraud must file his motion within three months of the entry of Judgment. Otherwise, relief must come through an independent action, which action must meet the usual requirements of filing and service of process. The gravamen of Appellant's request for relief relies upon theories which require that Appellant bring his motion for relief within the three-month limitations period.

The trial court found that, though styled as an application for a Writ of Coram Nobis, the request for relief was in reality introduced as a motion to a prior proceeding and not as a new action, and that Appellant's conduct and efforts at trial were consistent with that reality. The Respondent prays that the trial court's Judgment be upheld and that Appellant be required to comply with proper rules of procedure.

Respectfully submitted this 10 day of November, 1978

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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail postage prepaid and addressed to the Attorney for Appellant, Pete N. Vlahos, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, this 10 day of November, 1978.

DALE M. DORIUS